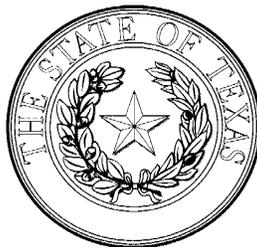


Opinion issued September 9, 2021



In The
Court of Appeals
For The
First District of Texas

NO. 01-20-00477-CR

NO. 01-20-00478-CR

NO. 01-20-00479-CR

IN RE THE STATE OF TEXAS EX REL. BRIAN W. WICE, Relator

Original Proceeding on Petition for Writ of Mandamus

**OPINION DISSENTING FROM THE DENIAL OF EN BANC
RECONSIDERATION**

In this original proceeding, the State requested mandamus relief from an order of the Harris County District Court vacating a previous change of venue order and returning the underlying cases to Collin County. The majority opinion concludes that the district judge who transferred these cases from Collin County to Harris County—the Honorable George Gallagher—lacked authority to do so because he presided

over the cases under an order of assignment that expired before he signed the change of venue order. Because this conclusion is erroneous, it should be revisited, and therefore, I respectfully dissent from the denial of en banc reconsideration.

Admittedly, the State has done little to advance an argument that Judge Gallagher's assignment did not expire before he transferred these cases to Harris County, beyond remarking in this Court and below that Judge Gallagher's authority had only "allegedly" lapsed. The State instead emphasized its arguments that (1) the real party in interest is precluded from challenging Judge Gallagher's authority under the law-of-the-case doctrine and rules for preservation of error and (2) Judge Gallagher was authorized to sit without an appointment order under the Texas constitutional provision permitting an exchange of benches. *See* TEX. CONST. art. V, § 11 ("[T]he District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law."). The decision to vacate Judge Gallagher's change of venue order and return these cases to Collin County presents an important question of law interpreting unambiguous assignment orders and raises concerns about the effective administration of the courts. *See Icon Benefit Admins. II, L.P. v. Mullin*, 405 S.W.3d 257, 264 (Tex. App.—Dallas 2013, orig. proceeding) (courts construe orders that can be given "a certain or definite legal meaning or interpretation" as matter of law). It is incumbent on this Court to correctly interpret the assignment orders and afford them "the literal

meaning of the language used,” even if the parties have not precisely articulated that meaning. *See id.* This has not been achieved in the majority opinion.

Judge Gallagher is an elected judge in the Eighth Administrative Judicial Region (“Eighth Region”). At the request of the Presiding Judge of the First Administrative Judicial Region (“First Region”), where these cases were pending in Collin County, the Presiding Judge of the Eighth Region assigned Judge Gallagher to the First Region on July 28, 2015 (“July 28 assignment order”). *See* TEX. GOV’T CODE § 74.056(b). Under the July 28 assignment order, Judge Gallagher was assigned to the First Region “*for reassignment by the Presiding Judge thereof . . . for a period of 157 days, beginning July 28th, 2015.*” (Emphasis added.) The July 28 assignment order stated that if Judge Gallagher began “a trial on the merits during the period of this assignment, the assignment continue[d] in such cases until plenary jurisdiction ha[d] expired or the undersigned Presiding Judge [of the Eighth Region] terminated this assignment in writing, whichever occurs first.”

The next day, the First Region’s Presiding Judge specifically assigned Judge Gallagher to the underlying cases (“July 29 assignment order”). In pertinent part, the July 29 assignment order provided:

This assignment is for the cause(s) and style(s) as stated in the conditions of assignment from this date until plenary power has expired or the undersigned Presiding Judge has terminated this assignment in writing, whichever occurs first.

CONDITION(S) OF ASSIGNMENT

NOS. 416-81913-2015, 416-81914-2015, 416-81915-2015; State of Texas [v.] Warren Kenneth Paxton, Jr.

Then, on December 18, as referenced in the majority opinion, the First Region's Presiding Judge signed an Order Extending Assignment by Presiding Judge ("December 18 assignment order"). Although the majority opinion characterizes this order as "extending Judge Gallagher's assignment to the underlying cases," the order did not reference the cause numbers set out in the "CONDITION(S) OF ASSIGNMENT" in the July 29 assignment order. Rather, the December 18 assignment order defined its subject matter as:

IN THE MATTER OF THE COLLIN COUNTY GRAND JURY 296TH JUDICIAL DISTRICT COURT

The December 18 assignment order provided:

By order dated October 23, 2015, the [First Region's Presiding Judge] assigned the Honorable George Gallagher, Active Judge of the 396th Judicial District Court, to preside in the *above matter* in which the Grand Jury requested appointment of a special prosecutor. The Grand Jury has requested an extension of its term for a period of 90 days to allow completion of its investigation, which has been granted by order dated December 15, 2015. Accordingly, the October 23, 2015 order assigning the Honorable George Gallagher to this matter should be extended to allow completion of the Grand Jury's investigation and any resulting actions required by the judge, including receipt of indictments, if any, from the Grand Jury.

IT IS THEREFORE ORDERED that the assignment of the Honorable Gallagher is extended from October 23, 2015 until such time as necessary to complete any actions required by Judge Gallagher as

the presiding judge in the *above matter*, unless the assignment is earlier terminated by the Presiding Judge of the [First Region].

(Emphasis added.)

Three days later, on December 21, the Eighth Region’s Presiding Judge signed another general order of assignment (“December 21 assignment order”), which assigned Judge Gallagher “to the [First Region] for reassignment by the Presiding Judge thereof . . . for a period of 366 days, beginning January 1, 2016.” The December 21 assignment order did not reference the underlying cases to which Judge Gallagher had been assigned by the First Region’s Presiding Judge five months earlier.

The majority opinion perceives a conflict between the assignment orders as to the duration and scope of Judge Gallagher’s assignment.¹ The majority opinion employs the general-versus-specific canon of construction to resolve the perceived conflict, even though that canon was not urged by the parties. *See Sims v. State*, 569 S.W.3d 634, 642 (Tex. Crim. App. 2019) (“The ‘general versus the specific’ canon of statutory construction stands for the proposition that ‘[i]f there is a conflict between a general provision and a specific provision, the specific provision

¹ I note the conflict the majority opinion perceives appears to be between the December 21 assignment order, entered by the Eighth Region’s Presiding Judge, and the December 18 assignment order, entered by the First Region’s Presiding Judge. Given that the December 18 assignment order does not reference the underlying cases, and instead references a matter related to grand jury proceedings, this would be error. The Court’s analysis should be of the July 29 assignment order that specifically assigned Judge Gallagher to the underlying cases.

prevails’ as an exception to the general provision.” (quoting ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 183 (2012)); *see also* TEX. GOV’T CODE § 311.026. The majority opinion then errs by giving greater effect to the general December 21 assignment order while ignoring the plain language of the specific July 29 assignment order that gave Judge Gallagher authority to preside over the underlying cases “until plenary power . . . expired or the [First Region’s] Presiding Judge . . . terminated th[e] assignment in writing,” neither of which happened before Judge Gallagher signed the change of venue order. Specifically, the majority opinion construes the 366-day period set out in the general December 21 assignment order as “defining the outer limit of Judge Gallagher’s assignment” to the underlying cases, despite no reference to these cases in that order. And, by applying the general-versus-specific canon, the majority opinion concludes the assignment orders “can be reasonably read to agree that Judge Gallagher’s assignment to . . . Collin County [and specifically to the underlying cases] was to end on January 2, 2017.”

There is no need to apply the general-versus-specific canon here because there is no conflict between the relevant assignment orders—the July 28 assignment order and the July 29 assignment order—as to the duration and scope of Judge Gallagher’s assignment. But even if that canon applied, it would compel the opposite conclusion.

As our sister court of appeals in Houston explained, visiting judges generally are assigned either for a period of time or to a particular case. *See In re Republic Parking Sys., Inc.*, 60 S.W.3d 877, 879 (Tex. App.—Houston [14th Dist.] 2001, orig. proceeding) (addressing nature of general versus specific assignments). A “general assignment to a court for a period of time” is exactly that—a “general” assignment that, “[b]y its nature, does not continue indefinitely.” *Id.* In contrast, a “specific” assignment is to a specific case. *Id.* “If a specific judge is assigned to preside in a specific case, that assignment must be withdrawn before any other judge may do so.” *Id.* Thus here, the July 29 assignment order—not the December 21 assignment order—is the specific assignment. *See id.*; *see also In re Canales*, 52 S.W.3d 698, 700 (Tex. 2001) (orig. proceeding) (noting that visiting judge was first assigned by general assignment to court for period of time, and later by specific assignment to particular case). By using the incorrect labels to interpret the assignment orders, the majority opinion renders the specific assignment meaningless.

The July 28 assignment order was a “general” assignment by the Eighth Region’s Presiding Judge that expressly authorized the First Region’s Presiding Judge to reassign Judge Gallagher to a specific case within the stated 157-day period. The First Region’s Presiding Judge did exactly that. Within the specified period and under the authority given, she made a “specific” assignment for Judge Gallagher to preside over the underlying cases. As specifically stated in the July 29 assignment

order, that assignment continued “until plenary power . . . expired or the [First Region’s] Presiding Judge . . . terminated th[e] assignment in writing[.]”

The second general assignment issued by the Eighth Region’s Presiding Judge—the December 21 assignment order—was superfluous, irrelevant to, and had no effect on the specific assignment order issued by the First Region’s Presiding Judge in accordance with and pursuant to the authority granted to her by the Eighth Region’s Presiding Judge five months earlier. The December 21 assignment order does not mention the underlying cases—it simply gave the First Region’s Presiding Judge the authority to “reassign” Judge Gallagher to any case she wanted during a 366-day period. The First Region’s Presiding Judge did not need to specifically assign Judge Gallagher to the underlying cases again, and she did not, because he was already specifically assigned to these cases by the July 29 assignment order.

Because the Eighth Region’s Presiding Judge gave the First Region’s Presiding Judge authority to assign Judge Gallagher, his specific assignment to the underlying cases in the July 29 assignment order was valid and continued unless and until it was terminated, as specifically stated in the order. The case law is clear that once the Eighth Region’s Presiding Judge authorized the First Region’s Presiding Judge’s reassignment (which she exercised in the July 29 assignment order), and there was no specific order assigning a new judge to the underlying cases (or valid basis to remove Judge Gallagher), Judge Gallagher was authorized to preside over

the underlying cases to conclusion. *See In re Republic Parking Sys.*, 60 S.W.3d at 879. I would therefore conclude that the assignment orders gave Judge Gallagher the authority to order the change of venue to Harris County.

Though en banc reconsideration of a case is not favored, the Court has discretion to determine that the extraordinary circumstances of this case warrant a second look. *See* TEX. R. APP. P. 41.2(c); *see also Tex. Dep't of Fam. & Protective Servs. v. Grassroots Leadership, Inc.*, No. 03-18-00261-CV, 2019 WL 6608700, at *1 (Tex. App.—Austin Dec. 5, 2019, mem. order) (Triana, J., dissenting opinion to denial of en banc reh'g) (appellate rules “do not define what constitutes ‘extraordinary circumstances,’” but “courts have discretion to determine whether such circumstances exist in a given case”); *cf. Polasek v. State*, 16 S.W.3d 82, 86 (Tex. App.—Houston [1st Dist.] 2000, pet ref'd) (en banc) (“We hold that our internal decision to proceed en banc is a matter of absolute discretion that is not reviewable.”); Michael J. Ritter, *En Banc Review in Texas Courts of Appeals*, 39 REV. LITIG. 377, 379 (2020) (asserting that “the en banc court’s disagreement with a panel’s decision is the most well-supported reason for granting en banc review”). Because the Court has chosen not to exercise that discretion, I am concerned the majority opinion’s holding that a subsequent general assignment trumps an earlier specific assignment, even when the subsequent general assignment does not mention the cases that are the subject of the earlier specific assignment, will lead to the very

result the majority opinion rightly seeks to avoid by creating confusion about the scope and effect of assignment orders within the shared jurisdiction of Houston's two appellate courts and by undermining the effective administration of the courts.

Assignments of elected and visiting judges are a routine practice across the state, and the resolution of this original proceeding is likely to guide the interpretation of assignment orders. The Court therefore must correctly analyze assignment orders by giving meaning to their clear language and by applying relevant case law and statutes, not only to provide consistent guidance, but also to ensure the efficient administration of justice.

Accordingly, I respectfully dissent from the denial of en banc reconsideration.

Amparo Guerra
Justice

En banc court consists of Chief Justice Radack and Justices Kelly, Goodman, Hightower, Countiss, Landau, Rivas-Molloy, and Guerra. Justice Farris not participating.

Goodman, J., dissenting from the denial of en banc reconsideration for reasons stated in his concurring and dissenting opinion.

Guerra, J., dissenting from the denial of en banc reconsideration with separate opinion.

Publish. TEX. R. APP. P. 47.2(b).